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Supreme Court of the United States

OCTOBER TERM 1945

No. 608

JAMES A. TAYLOR,

Petitioner,

against

NEW YORK CENTRAL RAILROAD COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

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INDEX

PAGE

Petition for Writ of Certiorari 1

The Judgments Sought to Be Reviewed 1

Basis of Jurisdiction 2

The Federal Question; the Presentation Thereof in Each of the State Courts 3

The Opinions Below 4

The Case in Brief 5

The Questions Presented 8

Reasons for Granting the Writ 9

Prayer for Granting the Writ 10

Brief in Support of Petition 11

The Opinions Below 11

Jurisdiction 12

Statement of the Case 12

Synopsis of Argument 12

POINT I—In the operation of cars and in furnishing transportation thereby and service therein, The Pullman Company itself is a "common carrier by railroad" 13

POINT II—Indeed, the contract between The Pullman Company and Central recognized the necessity of each to the other in the furnishing of this class or type of railroad transportation, and thus

PAGE

provided for joint operation on a joint venture basis. Therefore, the plaintiff was as much an employee of Central as of The Pullman Company 18

POINT III—Petitioner cannot be deprived of his rights, under the Federal Employer's Liability Act, as a railway employee in interstate carriage, by being employed through The Pullman Company 21

Conclusion 24

TABLE OF CASES CITED

Brewer v. N. Y. L. E. & W. Railroad Co., 124 N. Y. 59.. 22

N. Y. Central Railroad Co. v. Winfield, 244 U. S. 147 .....7, 8, 12, 14

Oliver v. North Pacific Railroad Co., 196 Fed. 432..... 18

Pennsylvania Railroad Co. v. Roy, 102 U. S. 451.....21, 23

Reinhart v. Gerosa Crane Service Co., 263 App. Div. 162 (N. Y.), 31 N. Y. S. 2d 162..... 14

Robinson v. Baltimore & Ohio Railroad Co., 237 U. S. 84 .....8, 9, 14, 18, 21

Seybolt v. N. Y. L. E. & W. Railroad Co., 95 N. Y. 562.. 22

Taylor v. N. Y. Central, 294 N. Y 397.....2, 4, 7

United States v. American Railway Express Co., 246 U. S. 425..... 15

United States ex rel. Chicago Refrigerator Co. v. Interstate Commerce Commission, 265 U. S. 292.....10, 15, 16

Wells Fargo & Co. v. Taylor, 254 U. S. 175.....10, 15

Table of Statutes

PAGE

Federal Employer's Liability Act (U. S. Code, Title 45, Chapter 2) 3, 14

Section 1 (Sec. 51 of Title 45) 13

Section 5 (Sec. 55 of Title 45) 13, 23

Section 6 (Sec. 56 of Title 45) 14

Interstate Commerce Act (U. S. Code, Title 49), Sec. 1 17

Judicial Code, Sec. 237b (U. S. Code, Title 28, Sec. 344b) .....

N. Y. Workmen's Compensation Law, Sec. 29 ..... 3, 6, 7, 10, 14, 22

Safety Appliance Act (U. S. Code, Title 45, Secs. 1-16) 16

Supreme Court of the United States

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No.....

JAMES A. TAYLOR,

Petitioner,

against

NEW YORK CENTRAL RAILROAD COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Honorable Supreme Court of the United States:

JAMES A. TAYLOR hereby respectfully applies for a writ of certiorari to require the certification to this Court, for review and determination, of the final judgments of the courts of the State of New York which dismissed his complaint against the New York Central Railroad Company (hereinafter referred to as Central) for damages for personal injuries sustained by him through its negligence in the operation of an interstate train.

The Judgments Sought to Be Reviewed

The original judgment was by the Supreme Court of the State of New York, New York County. That judgment was rendered and entered on June 7, 1944, in the office of the Clerk of New York County. It was affirmed by the Appellate Division of the Supreme Court of the State of

New York, in and for the First Judicial Department, by judgment entered on March 1, 1945, in the office of the Clerk of New York County. The Court of Appeals, thereafter by order dated April 19, 1945, granted to the petitioner leave to appeal from the said judgments. Upon the appeal so taken, the judgments of the lower courts were affirmed in a decision rendered July 19, 1945, and by judgment, pursuant thereto, entered in the office of the Clerk of New York County on August 6, 1945. A copy of that judgment was served on the petitioner's attorney on or about, but not before, August 28, 1945, and petitioner had no notice of the entry of such judgment until that day.

A motion for reargument was submitted to the Court of Appeals on the first day that that Court sat after the rendition of its decision, namely on October 1, 1945, and was denied by that Court on October 11, 1945.

The Court of Appeals of the State of New York is the highest court of that State. Petitioner has no further redress in the State courts.

Basis of Jurisdiction

This petition is pursuant to Section 237b of the Judicial Code (Section 344b, Title 28, U. S. C.) on the ground that this case presents a federal question (in several aspects) which has been passed on by the highest court of the State of New York, adversely to the petitioner.

Petitioner claims, and in his action in the State Court claimed, a right, privilege and immunity under a statute of the United States and the United States Constitution; and the same has been denied to him by a final judgment passed on and affirmed by the highest court of New York (*Taylor* v. *New York Central*, 294 N. Y. 397).

The Federal Question; the Presentation Thereof in Each of the State Courts

The federal question is whether the petitioner, as a porter on a Pullman sleeping car of an interstate railway train, comes within the purview and protection of the Federal Employers' Liability Act (U. S. Code, tit. 45, sec. 51 *et seq.*).

By way of defense to the petitioner's complaint (in the action which he brought 21 months after the accident), Central pleaded that, at the time of the injuries, the plaintiff was on board the train as an employee of The Pullman Company as a porter on one of its sleeping cars; that he received and accepted awards and compensation under the New York Workmen's Compensation Law and, under Section 29 of that Act, his cause of action against Central became assigned to The Pullman Company upon the petitioner's failure to bring the action within six months after the first award or within one year after the accrual cause of action (R., pp. 8-10).

The petitioner, in reply to this defense, pleaded, in substance, and among other things, that, at the time of the accident, he was on the train as a railway employee employed in interstate carriage and, therefore, by virtue of the Federal Employer's Liability Act and the Constitution of the United States, the New York Workmen's Compensation Law had no application to him and his cause of action was immuned from, and unaffected by, the limitations and impairment prescribed by the State act (R., pp. 11-12).

By consent, the issues raised by the affirmative defenses and reply thereto were tried first (R., pp. 17-19).

After the facts bearing upon these issues were adduced and after hearing counsel (R., pp. 19-38), the Trial Court

held that the New York statute applied and the Federal Employers' Liability Act did not apply, and that under the former, by reason of the failure to bring this action within the above referred to six months or one year periods, the petitioner was "divested of the right to bring this action" (R., p. 39).

The petitioner also urged that, under the peculiar facts of the case, even if the State law controlled, the six months and one year provisions were inapplicable under a proper construction of the State statute; but since that, too, was overruled, it is of no moment here.

On his intermediate appeal to the Appellate Division of the New York Supreme Court, petitioner presented and urged the federal question above indicated.

Petitioner reiterated those points in the Court of Appeals, and they were passed on in detail by that Court in its opinion affirming the judgments of the lower courts (294 N. Y. 397, 402-405).

Opinions Below

The opinion of the Court of Appeals is reported in 294 N. Y. 397.

The decision of the Appellate Division was without opinion (269 App. Div. 662, 53 N. Y. S. 2d 469).

The opinion of the Trial Court is unreported. It is contained in the record at page 39.

The Case in Brief

There is no dispute as to the facts on which this case has been disposed of.

On April 19, 1940, while on board one of Central's trains enroute from New York to Chicago, petitioner was

injured in a derailment accident as the train was passing through the City of Little Falls in Herkimer County, New York (R., pp. 5-7, 26, 31).

The petitioner was on the derailed train as a porter of one of the Pullman sleeping cars which was part of the train (R., pp. 27-29). He boarded the train in New York (R., p. 31) and was to serve as a porter on that train throughout the whole trip to Chicago and was to be a porter on a returning Central train from Chicago to New York (R., p. 26).

The sleeping car on which petitioner served as porter constituted part of the train and railway service under a contract between The Pullman Company and Central, which is in the Record as an exhibit (R., p. 27; Pltf.'s Ex. 1, R., pp. 40-65).

That contract required the furnishing by The Pullman Company of sleeping cars and parlor cars "to meet the requirements of travel" over the Central lines and also "combined baggage and club and other non-revenue cars" and for the operation thereof as an integral part of the Central railway system under a coordinated service-revenue-profit-responsibility sharing basis. The Central, among other things, hauls the cars, sells the tickets therefor, heats or cools and ventilates them, keeps them inspected and lubricated (R., pp. 45-47); The Pullman Company furnishes the cars and facilities and services therein (R., pp. 40-43, 47-48). The income (after deduction of certain of the expenses) is divided between the two companies, 20% and 80% to a certain point, then 60% and 40% up to another point and thereafter equally (R., pp. 52-61; a fuller synopsis of the terms of the contract appears at pp. 19-20, *infra*).

Petitioner was hired and paid and controlled by The Pullman Company; but petitioner urges, as he did, in the courts below, that, in reality and in law, by reason of the joint venture character and the provisions of the con-

tract between The Pullman Company and Central, the car was operated jointly by The Pullman Company and Central—by the latter at least as much as by the former—and, accordingly, he was the employee of both (R., pp. 10-12, 27-29). This, however, is petitioner's secondary argument, his primary contention being that in fulfilling its part of the above contract, The Pullman Company, itself, was a "carrier by railroad."

Shortly after the accident, The Pullman Company, as a *voluntary* self-insurer under the Workmen's Compensation Law of the State of New York, *voluntarily* commenced to pay to the petitioner workmen's compensation under the New York Law, and it filed with the State Department of Labor a notice to that effect (R., pp. 35-36; Pltf.'s Ex. 2, R., p. 67). Months later, on October 1, 1940, and a number of times thereafter, the State Department of Labor made various awards in favor of the petitioner which The Pullman Company paid (R., pp. 32-34). Up to the date of trial, on May 29, 1944 (R., p. 17) petitioner was paid by The Pullman Company a total of $3,324.39 which petitioner retained (R., p. 34).

On January 30, 1942 (R., pp. 1, 33)—21 months after the accident—petitioner brought suit in the Supreme Court of the State of New York against Central to recover damages for his injuries. He alleged in his complaint that the injuries were permanent and were suffered by him through the negligence of Central in the operation of the train (R., pp. 6-7). At the trial petitioner's counsel stated that he was "prepared to show that as a result of those injuries the plaintiff has been disabled for life" (R., p. 17; see R., pp. 33-34).

The New York Workmen's Compensation Law, under Section 29 thereof, provides that where an employee is injured in the course of his employment because of the negligence of a person other than his employer, he may have his remedy against such third party as well as his

compensation under the Workmen's Compensation Law; but in the event of a recovery, the net proceeds must be first applied to the reimbursement of the amounts received under the Compensation Law, and the balance is retained by the injured worker.

The same Section provides further that if the injured worker fails to bring action against the third party within six months after the first compensation award is made in his favor and paid, or, in any event, within one year after the accident, "such failure shall operate as an assignment" to the compensation payer of the injured worker's cause of action against the third party. However, in the event of a recovery by the compensation payer as such assignee, the statute provides that two-thirds of the excess of the recovery over the compensation paid goes to the injured worker.

In overruling the petitioner's contention that, under *New York Central* v. *Winfield*, 244 U. S. 147, the New York Workmen's Compensation Law had no application to him, as an interstate railway employee, the State courts have held that (1) the Federal Employers' Liability Act does not apply to The Pullman Company because, as "an operator of sleeping cars" it is not a "common carrier by railroad" within the meaning of that Act, and (2) despite the contract between The Pullman Company and Central for the operation of the sleeping cars as part of the latter's railway service on a service sharing and profit sharing and joint account basis, petitioner in no sense was an employee of Central and was the employee *solely* of The Pullman Company.

As to the first mentioned of these holdings, the New York Court of Appeals in its opinion acknowledged that *there is "no express holding in the cases" to that effect* (294 N. Y. 397, at p. 404), but nevertheless thought that "the answer seems plain enough" (*id*).

In holding that petitioner was in no sense an employee of Central, the New York Court of Appeals said that that aspect of the case was controlled by *Robinson* v. *Baltimore & Ohio Railroad Company*, 237 U. S. 84 (at pp. 403-4).

The Questions Presented

It is clear that as a porter on an interstate railway, the plaintiff, if he were in the direct employ of Central (the defendant), would be under the protection of the Federal Employers' Liability Act and his cause of action would in no wise be affected by any provision in the New York State Workmen's Compensation Law and he would have a clear right to maintain his suit against Central (*New York Central Railroad* v. *Winfield*, 244 U. S. 147).

1. The first question, therefore, is: Assuming that the petitioner was exclusively in the employ of The Pullman Company, is he thereby in a category so basically different that the Federal Employers' Liability Act has no application to him?

The holding of the New York courts that porters on interstate trains, doing the same work, are under one law—the Federal Employers' Liability Act—if they are employed directly by the operator of the railway system and under another law—the State law—if they are employed through The Pullman Company, seems clearly illogical, arbitrary and unjust.

Is such a differentiation dictated, or even warranted, by the provisions of the Federal Employers' Liability Act?

This question, as recognized by the Court of Appeals, *has not been passed on by this Court*, or any other federal court.

2. The second question is: If employees of The Pullman Company, as such, are excluded from the coverage of the Federal Employers' Liability Act, when such employees

serve on railways to render railway service, are they not *pro hac* also employees of the hauling railway company?

This question presents several subsidiary questions:

a. Did *Robinson* v. *Baltimore & Ohio Railroad Company, supra,* pass on this point? We maintain that it did not (see pp. 21-23, *infra*).

b. If *Robinson* v. *Baltimore & Ohio Railroad Company* did pass on this point, is the contract in this case between Central and The Pullman Company so substantially different that in this case, even if not in the *Robinson* case, the operation was a joint venture and the porter was as much an employee of the railroad operator as of The Pullman Company? We maintain that the answer is yes (see pp. 18-21, *infra*).

c. If *Robinson* v. *Baltimore & Ohio Railroad Company* stands in the way of equality of status and rights, under the Federal Employers' Liability Act, of all railway employees engaged on interstate trains, should that case not be overruled?

Reasons for Granting the Writ

1. As acknowledged in the opinion of the Court of Appeals, *neither this Court nor any lower federal court* has held that railway employees engaged in interstate carriage are outside the purview of the Federal Employers' Liability Act when employed by The Pullman Company. This case, thus, presents questions of federal law not heretofore passed on by this Court.

The cases relied on by the New York courts as affording so close an analogy or parallel as to warrant the conclusion that this Court would hold that railway employees such as petitioner are excluded from the Federal Employers' Liability Act, we submit do not warrant that conclusion.

Those cases are *Wells Fargo & Co.* v. *Taylor*, 254 U. S. 175, and *United States ex rel. Chicago Refrigerator Co.* v. *Interstate Commerce Commission*, 265 U. S. 292. But neither of those cases involved employees rendering railway service, as we point out more fully at pages 15-16, *infra*.

2. The railways and their labor relations, including the setting up of proper standards and safeguards for the employees, have been a major national concern for decades. Throughout those years, there has been emphasis, reflected in the decisions of this Court, on the necessity of uniformity—and, therefore, of exclusively national—regulation and control. The decisions here sought to be reviewed are in conflict with that national major objective and thus present a question of substantial public interest.

3. This case is of great importance to petitioner. Under the Federal Employers' Liability Act he is entitled to *full compensation—instead of only the fraction* provided for by the New York Workmen's Compensation Law —for the monetary loss imposed by his disability for life, and to an adeqaute allowance—*instead of nothing*—for his pain and suffering and for the impairment of his enjoyment of life and its normal pursuits.

4. The questions presented are important also to an entire, and not unsubstantial, class—the persons employed, in interstate carriage, on Pullman cars.

Prayer

WHEREFORE, petitioner respectfully prays that this petition for a writ of certiorari to review the complained of judgments be granted.

Dated: New York, November 2, 1945.

JAMES A. TAYLOR,

By: COPAL MINTZ,
Attorney for Petitioner.

Supreme Court of the United States

OCTOBER TERM 1945

No.....

JAMES A. TAYLOR,

Petitioner,

against

NEW YORK CENTRAL RAILROAD COMPANY,

Respondent.

BRIEF IN SUPPORT OF THE FOREGOING PETITION

The Opinions Below

The opinion of the Court of Appeals of the State of New York is reported in 294 N. Y. 397.

The decision of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, was without opinion (269 App. Div. 662, 53 N. Y. S. 2d 469).

The opinion of the Trial Court is unreported. It is contained in the record at page 39.

Jurisdiction

The grounds and basis of jurisdiction for the granting of the writ are set forth in the petition at pages 2-4, *supra.*

Statement of the Case

The case is stated in the petition, at pages 4-9, *supra.*

Synopsis of Argument

The rights of interstate railway employees injured in the course of their employment, are governed by the Federal Employers' Liability Act to the exclusion of derogatory State laws (*New York Central R. Co.* v. *Winfield,* 244 U. S. 147 reversing 216 N. Y. 284).

The fact that petitioner's employment to render the railway service was by or through The Pullman Company does not alter petitioner's rights, because:

First, in furnishing and rendering railway transportation and service, The Pullman Company itself is a "common carrier by railroad";

Secondly, under and by virtue of the contract between The Pullman Company and the Central, petitioner was in the employ of the Central as well and as much as in that of The Pullman Company;

Thirdly, Central cannot impair the rights and immunities given by Federal Law to railway employees—or acquire defenses against them under State law in derogation of the Federal statute—by contracting with another corporation for the rendition of railway service through men hired and paid by or through such other corporation.

POINT I

In the operation of cars and in furnishing transportation thereby and service therein, The Pullman Company itself is a "common carrier by railroad."

Section 1 of the so-called Federal Employers' Liability Act (Section 51 of Title 45 of the U. S. Code), provides:

> "Every common carrier by railroad while engaging in commerce between any of the several states * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * * resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier * * *."

Under the same Section:

> "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth,"

is an employee in such commerce entitled to the benefits of the Section.

Section 5 (Sec. 55 of Title 45) provides:

> "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: Provided, That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought."

The limitation under that Act is three years (Section 56). Under the same section, the State and Federal courts are given concurrent jurisdiction over actions by injured employees of carriers.

It is, of course, settled that the rights and remedies of employees of interstate railways, injured in the course of their employment, are controlled exclusively by the Federal Employers' Liability Act (Chap. 2, Title 45, U. S. Code) and that it is paramount to and excludes the New York Workmen's Compensation Law (*New York Central Co.* v. *Winfield,* 244 U. S. 147, reversing 216 N. Y. 284).

In recognition of that principle, the New York case of *Reinhart* v. *Gerosa Crane Service Co.,* 263 App. Div. 28, 31 N. Y. S. 2d 162, held that Section 29 of the Workmen's Compensation Law did not impair the right of a maritime employee, who accepted compensation under that statute, to maintain his action against the third party whose negligence caused his injuries.

The defendant herein has prevailed in the courts of New York on its argument that the foregoing have no application because the plaintiff was an employee of The Pullman Company. The Trial Court ruled (R., p. 39):

> "* * * The Pullman Company does not appear to be considered a common carrier engaged in interstate commerce in this circumstance (Robinson v. Baltimore & Ohio Rr. Co., 237 U. S. 84; * * *"

The Court of Appeals, relying on *Robinson* v. *Baltimore & Ohio Railroad Co.,* held that the petitioner was not in any sense or to any degree an employee of Central (294 N. Y. 397, at pp. 403-404) and (at pp. 404-405):

> "Nor does plaintiff, as an employee of the Pullman Company, come within the Federal Act and escape the controls of the Workmen's Compensation Law. We find no express holding in the cases as to whether or not an operator of parlor and sleeping

> cars is liable to its porters under the Federal Act, but the answer seems plain enough * * *."

citing *Wells Fargo & Co.* v. *Taylor*, 254 U. S. 175, *United States, ex rel. Chicago, New York & Boston Refrigerator Co.* v. *Interstate Commerce Commission*, 265 U. S. 292, and several New York cases.

That the Trial Court erred in regarding *Robinson* v. *Baltimore & Ohio Railroad Co.* as holding that The Pullman Company was not a "carrier by railroad," was recognized by the Court of Appeals, for in their opinion they say that they "*find no express holding in the cases as to whether or not an operator of parlor and sleeping cars is liable to its porters under the Federal Act.*"

We submit that the Court of Appeals, in turn, erred in regarding the two cases cited by it as being so analogous that it "seems plain enough" that The Pullman Company is not a "carrier by railroad." Each of those cases, we respectfully submit, is plainly distinguishable and affords no parallel.

In the *Wells Fargo & Co.* case, Wells Fargo & Co. owned no railroad cars. It did not carry on rails. It engaged in the express business. As far as its customers were concerned, it could transport the goods by truck, boat or any other means. In procuring carriage by railroad, the express company was hiring carriage service, not rendering it. The distinction is made clear in *U. S.* v. *American Railway Express Co.*, 246 U. S. 425, wherein it was said "that the natural meaning of the term 'carrier by railroad' is one who operates a railroad, not one whose shipments are carried by a railroad" (at p. 432).

Unlike express companies, The Pullman Company is not one who pays for carriage but is paid therefor. It does not contract for railway services to be rendered to it. It contracts to furnish the cars and to carry and service

passengers thereon. The cars and the fares and the service must comply with all the provisions and requirements of the railway statutes, including the "Safety Appliance Act" (Sections 1-16, Title 45, U. S. Code), and of the Interstate Commerce Commission.

The *Chicago Refrigerator Co.* case did not arise under the Federal Employers' Liability Act. It dealt with the claim of the Refrigerator Co. to a government railway subsidy under the Transportation Act of 1920. The Refrigerator Co. did nothing more than rent its cars to railway companies for a per mile rental; it did not in any way participate in the operation thereof. As a mere lessor of equipment, wholly disassociated from the operation thereof, it was not a carrier. It filed no tariffs with the Interstate Commerce Commission. It was incorporated to do a manufacturing business, and was not authorized by its articles of incorporation to operate as a carrier. This Court confirmed the correctness of the finding by the lower Court "that the Refrigerator Co. is not incorporated as a carrier, does not control or use the necessary facilities for performing carriage, does not hold itself out to perform carriage by publishing rates applicable thereto, and does not in fact perform carriage or receive any compensation from shippers whose shipments move in its cars. The cars are rented to railway companies. They are subject to the control of the latter and are to all intents and purposes their property during the period of lease. In a word the Refrigerator Co. carries nothing."

The facts as to The Pullman Company are in direct antithesis to the foregoing in every detail.

If The Pullman Company, insofar as it operates railroad cars and furnishes railway service, is not a "common carrier by railroad," what is it? Can anyone supply a reasonable definition which would exclude the operator of conveyances run as part of a regular railway service,

available to all who pay the price as fixed by tariffs approved by the Interstate Commerce Commission? If there could be any doubt on the subject, the Interstate Commerce Act (Title 49 of the U. S. Code) leaves no room for quibbling, for it expressly provides in subdivision 3 of Section 1 (emphasis supplied):

> "(a) The term 'common carrier' as used in this chapter shall include * * * *sleeping car companies;* and all persons, natural or artificial, engaged in such transportation as aforesaid, as common carriers for hire."

When one travels in a parlor car or in a sleeping car, is he not being carried by railroad? How can it reasonably be said that the company which furnishes him with the seat or the berth or the room and who receives part of his fare, is not engaged in the business of carrying him by railroad?

Is the carrier only the company which furnishes the locomotion? Is not the company which furnishes the vehicle on which the passenger is carried, and who looks after him throughout the journey, also the carrier?

We urge that since carriage cannot be effected without either the locomotive or the passenger car, where several join to bring about the requisite combination, the owner and operator of the one is as much the carrier as the owner and operator of the other. In such circumstances, the carriage results only from the combination, and both and each are carriers.

POINT II

Indeed, the contract between The Pullman Company and Central recognized the necessity of each to the other in the furnishing of this class or type of railroad transportation, and thus provided for joint operation on a joint venture basis. Therefore, the plaintiff was as much an employee of Central as of The Pullman Company.

We recognize that the similar argument in *Robinson* v. *Baltimore & Ohio Railroad Co., supra,* 237 U. S. 84, was rejected. But the rejection there was based upon the contract there adduced. We believe that substantial differences between the contract there in evidence and the contract here in evidence, should lead to a different conclusion.

That there is no rule of thumb for the determination of such questions is demonstrated by *Oliver* v. *North Pacific Railroad Co.,* 196 Fed. 432, where, upon the evidence there adduced, the Court found that the Pullman porter's employment was by The Pullman Company and the railroad company jointly, and, consequently, the release stipulation in the porter's contract with The Pullman Company was no defense to his action against the railroad company.

Here the contract between The Pullman Company and Central (Pltf.'s Ex. 1, R., pp. 40-65) was substantially different from the contract between The Pullman Company and the Baltimore & Ohio Railroad Co. introduced in evidence in the *Robinson* case. In the latter case, according to the opinion, "The Pullman Company supplied its own facilities" except for hauling and oiling, and the railroad company received no part of the revenue up to $7,750 per car per annum. Only if the revenue exceeded that, and to the extent of one-half of such excess, did the railroad company share in the revenue.

In contrast, the contract here provided for sharing both in the operation and maintenance (by a dovetailing of services and allocation of expenses) and in the net profits —net, not as in the *Robinson* case, in the gross receipts above a stated figure.

The contract here was for the furnishing and manning of sleeping cars and parlor cars "to meet the requirements of travel over the lines of" Central (R., p. 40), and also "combined baggage-club cars or other non-revenue cars" (R., p. 41). It provided for certain services to be rendered by Central and other services by The Pullman Company, to the satisfaction of Central, so that, in combination, the required railway services would be rendered satisfactorily; and it provided for a sharing of the revenue, profits, and responsibility.

Under the agreement, the cars are furnished by The Pullman Company (R., pp. 40-41) subject to purchase thereof by Central upon the termination of the agreement (R., pp. 41, 64-65), and are hauled by Central without charge to The Pullman Company (R., p. 45). Also without charge to The Pullman Company, Central's agents sell Pullman tickets at its railroad ticket offices, and, among other things, it furnishes storing facilities, inspects for repairs, lubricates the cars, furnishes ice water, furnishes cooling energy for air-conditioning, furnishes the heating for cars, disposes of refuse (R., pp. 45-47). The cost of those services are not included "in the operating expenses in the settlement of accounts" between the parties (R., p. 47).

Other services are furnished by The Pullman Company, the cost of which are "included in the operating expenses in the settlement of accounts" (R., pp. 47-48).

The defrayal of the cost of air-conditioning old cars is provided for in a supplemental agreement not in evidence (R., p. 42). The cost of maintaining and operating the air-

conditioning in new cars (other than the cooling energy which is furnished by Central without charge) is borne by Central to the extent of 75% and by The Pullman Company to the extent of 25% (R., p. 42).

Responsibility for damages to the cars and for personal injuries, in some circumstances, are borne by The Pullman Company and in other circumstances by Central (R., pp. 44, 48-51).

The net earnings, computed in accordance with the contract, are divided in accordance with complicated formulae (R., pp. 52-58). The division substantially is as follows: Of the net operating earnings "of all sleeping cars and new type light weight parlor cars" (R., pp. 52-56) until The Pullman Company gets 80% of a return of 1¾% per annum on its cost of the cars and equipment plus 2% on the depreciated cost thereof plus 3¾% on the employed working capital, Central gets 20% and The Pullman Company 80% of the gross profits, and of the profits above that, Central gets 60% and The Pullman Company 40% up to a certain point and thereafter they are divided equally (R., pp. 52-56). Of the net operating revenue derived from the operation of "present type parlor cars, combined baggage-club cars and other non-revenue cars," The Pullman Company receives an amount equal to 2% of the cost of those cars plus 2% of the depreciated cost plus 3¾% on the employed working capital, and the remainder is divided 40% and 60% up to a certain point and thereafter equally (R., pp. 56-58).

It seems to us clear that this is a joint venture arrangement for the furnishing of required interstate railway facilities and services. Central hauled these cars as part of its trains; the occupants of those cars were its passengers whose regular fares it enjoyed in full and whose supplementary fares it shared with The Pullman Company. The defendant was as much—at least, as much—interested in the operation and revenue of these cars as The Pullman Company. These cars were an essential part of Central's railway service.

The plaintiff herein as a porter on one of the Pullman sleeping cars was rendering service to Central's passengers in that car; he was rendering a service which Central was bound to render and had a legal duty to render.

As far as the passengers are concerned, this Court held in *Pennsylvania Railroad Company* v. *Roy*, 102 U. S. 451, the employees in the sleeping car were the employees of the hauling railway company—

> "For the purposes of the contract under which the railroad company undertook to carry Roy over its line, * * * *the sleeping car company, its conductor and porter, were, in law, the servant and employees of the railroad company.* Their negligence, or *the negligence of either of them*, as to any matters involving the safety or security of passengers while being conveyed, was the negligence of the railroad company" (at p. 457; italicization supplied).

Although the petitioner thus was an employee of Central to the passengers, is it reasonable to hold that he was not such an employee with respect to his statutory rights as a railway employee, even though Central shared in the extra charge made for the sleeping car accommodations and for the petitioner's service?

POINT III

Petitioner cannot be deprived of his rights, under the Federal Employers' Liability Act, as a railway employee in interstate carriage, by being employed through The Pullman Company.

Robinson v. *Baltimore & Ohio Railroad Company*, we submit, is not applicable here also for another reason: That case did not pass on the question of whether a Pullman Company porter is or is not an employee of a "common carrier by railroad"; it was decided only that porter

Robinson was not an employee of the Baltimore & Ohio Railroad Co.; his status under the Act as an employee of The Pullman Company was not discussed.

In other words, whether as between the porter and The Pullman Company, the former was protected, and his rights were controlled, by the Federal Employers' Liability Act, was not the question in the *Robinson* case, as it is here.

The defense pleaded in that case was that Robinson, unlike the plaintiff in this case, in his contract with The Pullman Company, had agreed not to sue, and had released from liability to him, any railway company on whose road his employment might carry him. This Court held that the Employers' Liability Act nullified such a release by an employee to his employer, but did not strike down such a release of a railway which was not his employer. In other words, the case hinged, not on whether Robinson was a railway employee covered by the Act, but on whether there was an employer-employee relationship between him and the Baltimore & Ohio Railroad.

Here, on the other hand, the question is the basic one of whether the State law or the Federal law applies, and the answer, it seems plain, is dependent not on the identity of the petitioner's employer but on the nature of petitioner's service.

Petitioner's cause of action against the Central was not in enforcement of the latter's liability as employer but as a negligent carrier. His action was the ordinary and usual one against a carrier for negligence, it being immaterial whether he was on the train as a fare paying passenger or otherwise, so long as he was lawfully on the train (*Seybolt* v. *N. Y. L. E. & W. R. R. Co.*, 95 N. Y. 562; *Brewer* v. *Same*, 124 N. Y. 59, and cases cited therein).

It is Central which, invoking the alleged operation of the New York Workmen's Compensation Law as between the petitioner and The Pullman Company, asserts, as a

third party, a special benefit and immunity from the fact that at the time of the accident the petitioner was in the employ of The Pullman Company and he delayed bringing the action longer than allowed to him by that New York statute. Petitioner's reply is that the New York statute has no application to him because he, as a railway employee employed in interstate carriage, is protected by the federal statute to the exclusion of the State Compensation Law.

Obviously, the pleaded defense would not be available and the petitioner's right to recover in his action would be unquestioned, if he were on the train as the direct employee of Central. We submit that the petitioner's rights and immunities are no different simply because instead of employing car porters directly, Central procured porter service, on the train, by contracting with another corporation—The Pullman Company—to render that indispensible railway service through men hired by or through such other corporation and paid out of transportation revenue.

This Court, in holding the hauling company liable to its passengers for the acts of the sleeping car employees, said in *Pennsylvania Co.* v. *Roy, supra*, 102 U. S. 451, 457:

> "The law will not permit a railroad company, engaged in the business of carrying persons for hire, through any device or arrangement with a sleeping car company whose cars are used by the railroad company, and constitute a part of its trains, to evade the duty of providing proper means for the safe conveyance of those whom it has agreed to convey."

Yet, can the rights of the employees be circumvented by such a device? A negative answer seems to us inescapable from the express provision in Section 5 of the Federal Employers' Liability Act (Title 45, U. S. C., Sec. 55) that:

"Any contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt himself from any liability created by this Chapter shall to that extent be void * * *."

Conclusion

It is respectfully submitted that, to the grievous detriment of petitioner, the New York courts have misconstrued the Federal Employers' Liability Act and have erred in refusing to apply it to the petitioner, and for the reasons set forth in the petition (at pp. 8-10, *supra*) and above, the prayer for writ of certiorari should be granted.

Dated: November 2, 1945.

Respectfully submitted,

COPAL MINTZ,
Attorney for Petitioner.

FILED
DEC 27 1945
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM 1945

No. 608

JAMES A. TAYLOR,

Petitioner,

against

NEW YORK CENTRAL RAILROAD COMPANY,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INDEX

	PAGE
Opinions Below	1-2
Jurisdiction	2
Statement of the Case	2-5
POINT FIRST—The remittitur of the Court of Appeals does not show that a Federal question was presented and passed upon. Petitioner has not made the customary motion to amend it	6
POINT SECOND—Application does not appear to be within Section 344(b) of the Judicial Code or Rule 38(5) of the Rules for Review on writ of certiorari	7
POINT THIRD—Petitioner's argument	8
POINT FOURTH—The petition should be denied	15
SUBJECT MATTER:	
Petitioner has not moved to amend remittitur	6
Application does not appear to be within Section 344(b) or Rule 38(5)	7
The New York Courts decided case on the pleadings, a certain contract and the record	8, 11
Petitioner's reliance on the State Compensation Act resulted in determination that under that Act, his cause of action had been assigned to another, under State law	5, 12
Where there are two grounds and the non-federal ground is insufficient, this Court ordinarily will not take jurisdiction	12
Answers to the four Reasons assigned by petitioner	12-15

PAGE

Public Policy of compensation as against actions for damages 13-14

Petitioner's case is not of importance.....13-15

TABLE OF CASES CITED

Adams v. New Jersey Steamboat Company, 151 N. Y. 163 .....9, 11

Chicago Refrigerator Company v. I. C. C., 265 U. S. 292 10

Christie v. 46th Street Theatre Corp., 292 N. Y. 643... 6

City of New Rochelle v. Echo Bay Waterfront Corporation, 294 N. Y. 771..... 6

Ives v. South Buffalo Railroad, 201 N. Y. 271..... 14

Lynch v. New York, 293 U. S. 52..... 12

Mabee v. White Plains Publishing Co. Inc., 294 N. Y. 701 6

Matter of City of N. Y., 284 N. Y. 701..... 6

McGoldrick v. Gulf Oil Co., 309 U. S. 2..... 7

Missouri, Kansas and Texas Railway v. West, 232 U. S. 682 8

Nelson v. Buffalo, Niagara Electric Co., 264 App. Div. 941, affd. 292 N. Y. 600..... 3

Pedersen v. Fitzgerald, 293 N. Y. 872..... 6

People v. Lonergan, 294 N. Y. 972..... 6

People v. Schappes, 291 N. Y. 644..... 6

People v. Schneider, 285 N. Y. 547..... 6

People v. Winters, 294 N. Y. 979..... 6

Post v. Burger, 216 N. Y. 544..... 14

Robinson v. Baltimore & Ohio Railroad, 237 U. S. 84..10, 11

Wells Fargo & Co. v. Taylor, 254 U. S. 175.....10, 11

Table of Statutes

PAGE

Federal Employers' Liability Act
(U. S. Code, Title 45, chap. 2, Section 51)....10, 11, 13

Interstate Commerce Act
(U. S. Code, Title 49, sec. 1(3))..... 11

Judicial Code
U. S. Code, Title 28, Section 344(b)..... 2, 7

64 McKinney's New York Cons. Laws
Page 175 3
Page 403 3

New York Civil Practice Act
Sec. 588 1
Sec. 589 2

New York State Constitution
Article VI, Section 7(1)..... 1, 2
Article I, Section 18..... 14

New York State Session Laws
Laws of 1910, chap. 674..... 13
Laws of 1914, chap. 41, sec. 29.....3, 14

New York Workmen's Compensation Law
Section 3, Group 14..... 3
Section 29(1) 3

Rules of the Supreme Court
(U. S. Code, Title 28, Rule 38(5))..... 7

Supreme Court of the United States

OCTOBER TERM 1945

No. 608

JAMES A. TAYLOR,

Petitioner,

against

NEW YORK CENTRAL RAILROAD COMPANY,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Opinions Below

The opinion of the Court of Appeals of the State of New York unanimously affirming the judgment dismissing the complaint is reported in 294 N. Y. 397.

The Constitution of the State of New York provides that an appeal to the Court of Appeals may be taken as of right from a judgment or order entered upon a decision of the Appellate Division which finally determines an action or special proceeding wherein is directly involved the construction of the Constitution of the United States (Art. VI, Sec. 7(1); Civil Practice Act, Sec. 588). Petitioner took an appeal as of right, pursuant to these provisions, "on the ground that there 'is directly involved the construction of the Constitution of • • • the United States'" (his brief, p. 1).

The Court of Appeals dismissed that appeal (294 N. Y. 775).

Plaintiff reached the Court of Appeals, not under that asserted federal ground, but pursuant to the regular practice of securing leave so to do, as is provided for in Constitution Section 7, (5) and C. P. A. Section 589.

The Court of Appeals did not write in granting respondent's motion to dismiss the first appeal, or later in denying petitioner's motion for reargument (294 N. Y. 977).

The remittitur of the Court of Appeals (record, pp. 92-93) contains no certification that a federal question had been presented and necessarily passed upon.

The decision of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, unanimously affirming, without opinion the judgment of the Trial Court dismissing the complaint is reported in 269 App. Div. 662.

The opinion of the Trial Court is unreported. It is found in the record at page 39.

Jurisdiction

Petitioner seeks to invoke the jurisdiction of this Court under Section 237b of the Judicial Code (USCA Title 28, Sec. 344b) asserting as grounds, rights, privileges and immunities under a Federal statute and under the United States Constitution (Petition, p. 2).

Statement of the Case

This is a third party action for personal injuries sustained on April 19, 1940, by a sleeping car porter employed by the Pullman Company, when the sleeping car attached to a train hauled by respondent, was derailed.

The New York State Workmen's Compensation Law in express terms covers work in parlor cars and sleeping cars.

Section 3, Group 14, 64 McKinney's Cons. Laws, page 175.

The original New York Workmen's Compensation Act required an employee entitled to compensation to elect whether to take compensation under the Act or to pursue his remedy against a third party.

Laws of 1914, Chap. 41, Sec. 29.

By subsequent amendments, this latter provision was amended, so as to provide that the employee is no longer bound to make that election, but may take compensation and also bring a third party action; and that, if he takes compensation and desires to bring a third party action, such action must be commenced not later than six months after the awarding of compensation (the first award; *Nelson* v. *Buffalo, Niagara Electric Co.*, 264 App. Div. 941, affirmed 292 N. Y. 600), and, in any event, before the expiration of one year from the date such action accrued.

Section 29, Subdiv. 1, 64 McKinney's Cons. Laws, page 403.

The State Compensation Act further provides that, if the employee has taken compensation under the Act, but has failed to commence his third party action within the above time limits "such failure shall operate as an assignment of the cause of action" against the third party to the corporation liable for the payment of such compensation (here the Pullman Company).

On May 13, 1940, the Pullman Company, the employer, duly filed the necessary form for compensation (Plaintiff's Exhibit 2, pp. 67-8).

On October 2, 1940, after a hearing before the New York State Industrial Commission, at which petitioner was present in person, he was awarded workmen's compensation for his injuries (Exhibit A, p. 69). The award was paid and accepted by him (record, p. 33).

On February 14, 1942, petitioner filed with the Department of Labor a notice wherein he made a "claim for all benefits due me under the Workmen's Compensation Act" (record, p. 71). Pursuant to that claim and after hearings, at which both he and his attorney were present (pp. 33-4) additional awards were made and accepted in June and December of 1942, June and November 1943 and in February of 1944. The awards in May, 1944, aggregated $3,234.39 (record, pp. 33-4) and petitioner still has a continuing right to compensation (Exhibit B, pp. 70-71).

It is undisputed that petitioner failed to commence his action against respondent within either of the periods specified in the Act (record, p. 10), that is to say, he commenced his action against respondent on January 30, 1942, which was 16 months after the award of compensation, and one year and nine months from the date such action accrued.

Therefore, as respondent claimed and the State Courts have held, the cause of action which petitioner had against respondent was assigned, by operation of the Act, to the Pullman Company, the corporation liable for the payment of his compensation (record, p. 69).

Petitioner did not disavow his claim under the Workmen's Compensation Law before the Appellate Division or the Court of Appeals. He insisted on it. In all courts, he still claimed that because of a certain contract between the Pullman Company, this respondent and other railways, he *continued* to have the right to bring this action under the Workmen's Compensation Law.

From his complaint, dated July 15, 1941 (record, p. 4), in which after describing respondent as a railroad, petitioner alleged that at all times hereinafter mentioned he was a porter employed by the Pullman Co. (record, pp. 5-6), to his motion for reargument in the Court of Appeals dated September 10, 1945, he insisted that, because of the said contract between the Pullman Company and respondent, he had a right, under the Workmen's Compensation Law, to bring this action when he did, and that his failure to bring the same within the periods specified in the Act, did not operate as an assignment to the Pullman Company or that he had a right to maintain the action as "*cestui que trust*" for the Pullman Company and himself (Petitioner's Briefs, App. Div. p. 24; Court of Appeals p. 29; Reargument p. 5).

These questions, quite obviously required the State Courts to construe the Workmen's Compensation Law and to decide whether the application thereof was affected by the said contract between the Pullman Company and respondent, which petitioner had pleaded in his amended reply and introduced in evidence and on which he had based this argument. It is quite obvious, and, we assume, undisputed, that this was a State question and not a federal question.

We respectfully urge, aside from other points, that the decision of the Court of Appeals that petitioner, by his own failure, had brought about an assignment to the Pullman Company of his cause of action, completely ended this litigation—that is to say, that this decision of a State and non-federal question that plaintiff, because of his own acts, has no cause of action and that the same belongs to someone else, is a finality.

FIRST

The remittitur of the Court of Appeals does not show that a Federal question was presented and passed upon. Petitioner has not made the customary motion to amend it.

The remittitur of the Court of Appeals (record, pp. 92-93) does not show that the decision of that Court on a federal question was necessary to the determination of the appeal, that a federal question was actually decided or that its judgment as rendered could not have been given without deciding it. The settled practice in New York is that an applicant for certiorari shall move to amend the remittitur so that the Court of Appeals may make an appropriate certificate and this Court may have the benefit of a statement by the State Court that federal questions were or were not necessarily passed upon by the State Court. The practice of the Court of Appeals is either (1) to deny the motion or (2) to certify that such a question was presented and necessarily passed upon and to further state what the Court actually held with respect to the question.

Matter of City of N. Y., 284 N. Y. 701;
People v. *Schneider*, 285 N. Y. 547;
People v. *Schappes*, 291 N. Y. 644;
Christie v. *46th Street Theatre Corp.*, 292 N. Y. 643;
Pedersen v. *Fitzgerald*, 293 N. Y. 872;
Mabee v. *White Plains Publishing Co., Inc.*, 294 N. Y. 701;
City of New Rochelle v. *Echo Bay Waterfront Corporation*, 294 N. Y. 771;
People v. *Lonergan*, 294 N. Y. 972;
People v. *Winters*, 294 N. Y. 979.

Petitioner made no application to amend the remittitur.

SECOND

Application does not appear to be within Section 344(b) of the Judicial Code or Rule 38(5) of the Rules for Review on writ of certiorari.

I. Section 344(b).

In this case, the decision of the Court of Appeals rested on a construction of the New York Workmen's Compensation Act. Petitioner fully argued that question in his briefs (*ante*, pp. 4-5). In the absence of an explicit statement by the Court of Appeals, in its remittitur, that its ruling upon an asserted federal question raised by petitioner was necessary to its decision of the case, petitioner is called upon to show from the record that it affirmatively appears that the decision did not rest upon an adequate non-federal ground.

McGoldrick v. *Gulf Oil Co.*, 309 U. S. 2.

That, we respectfully urge, he has not done and is quite unable to do.

II. Rule 38(5).

There are neither special nor important reasons for granting a writ in this case. The State Court has not decided a federal question of substance not heretofore determined by the Supreme Court. It wrote on the question which petitioner claims to be a federal one. It did so for the simple reason that petitioner had argued it. It decided this question in accord with applicable decisions of this Court. It cited and relied on decisions of this Court to show why petitioner was in error (record, p. 89). It did not distinguish or overrule any of them. It followed them.

As above stated, the New York Compensation Law provides for coverage for work in parlor cars and sleeping

cars and petitioner throughout claimed that he was entitled to compensation under the Workmen's Compensation Law as an employee of the Pullman Company. This appears from the pleadings and record.

The State Courts decided, with adequate basis for their decisions, that the pleadings and the evidence showed an action under the employment by the Pullman Company which was given by the Workmen's Compensation Act and that petitioner had failed to take advantage of the Act and that his cause of action had been assigned by operation of the Act to the corporation which had paid him compensation and that his asserted reasons, under the Workmen's Compensation Act, for bringing the action at the time he did were insufficient under the Workmen's Compensation Act. On a very similar record this Court has held that even writ of error does not lie.

> *Missouri, Kansas and Texas Railway* v. *West*, 232 U. S. 682.

THIRD

Petitioner's argument.

I. As to petitioner's position before the State Courts, we accept his statement in his brief for reargument in the Court of Appeals:

> "1. The Pullman Company, by reason of and under its contractual obligations to the defendant, at all times was unable and barred from prosecuting the cause of action; being thus incapable of serving as assignee, the provided for assignment, as a matter of substantive law, did not take effect.
>
> 2. Assuming title to the cause of action nevertheless vested in The Pullman Company, since the same section of the Workmen's Compensation Law

left the plaintiff the right to two-thirds of the recovery in excess of the compensation paid to him, as a matter of procedural law, he, as such owner of a substantial equitable interest in the cause of action, had the right to sue, upon demonstrating that the legal owner of the cause of action was dissipating, or would dissipate, his rights.

3. The plaintiff having been injured while working as an interstate railway employee, the New York State Workmen's Compensation Law does not apply to him."

Petitioner's arguments numbered "1" and "2"

It is unnecessary, in this brief, to enter into the interesting economic considerations which led the eminent draftsmen of the original Compensation Act and amendments to write the Act in its present form, or to review as fully as we did in the State Courts the various interlocking provisions of the Act, written to ensure compensation to injured employees and to obviate the necessity of their maintaining actions in the Courts.

Many years ago, in *Adams* v. *New Jersey Steamboat Company* (151 N. Y. 163, 168, 169), the Court of Appeals held:

"Sleeping car companies are neither innkeepers nor carriers.

"The contract for transportation • • • is with the railroad, the real carrier. All the relations of passenger and carrier are established by the contract implied in the purchase of the regular railroad ticket *and the sleeping car is but an adjunct to it,* only for such of the passengers as wish to pay an additional charge for the comfort and luxury of a special apartment in a special car (italics ours).

"The contract which gives the passenger the right to occupy a berth or a seat does not alone secure to him the right of transportation. It simply gives him the right to enjoy special accommodations at a specified place in the train."

We respectfully urge that Workmen's Compensation was a proper and urgently needed subject for State enactment (*post*, pp. 13-15) and was highly beneficial to Pullman porters (*post*, p. 14). We further urge that petitioner's complaint and activities in pressing arguments "1" and "2" in all the Courts, clearly show that the decision of the State Courts determined that the cause of action which he had failed to bring within the times specified in the Act, belonged to the Pullman Company, by operation of that Act, and that his other reasons have no materiality when once this contention under the Act has been found by the Court of Appeals, as a state and non-federal question, to be without merit.

Petitioner's argument numbered "3"

We respectfully urge that this argument is not of substance. As we have pointed out, the Court of Appeals dismissed an appeal by petitioner as of right based on the ground that there was directly involved the construction of the Constitution of the United States (*ante*, pp. 1-2).

Nor is the point novel. In *Wells Fargo & Co.* v. *Taylor*, 254 U. S. 175, 187, this Court was called upon to determine whether the Employers' Liability Act embraced an express company, which, like the Pullman Company, neither owned nor operated a railroad, and it held that the express company was not a "common carrier by railroad," as used in the Act before it, that those words mean one who operates a railroad as a means of carrying for the public—that is to say a Railroad Company acting as a common carrier and that this view was in accord with the ordinary acceptance of the words. In *Chicago Refrigerator Company* v. *I. C. C.* (265 U. S. 292, 297), this Court held, on the authority of the *Wells Fargo* case, that a Car Company, which like the Pullman Company owned cars (p. 294) was neither the owner of nor operated a railroad and was not a carrier by railroad. In *Robinson* v. *Balti-*

more & Ohio Railroad (237 U. S. 84), this Court passed on an earlier form of contract essentially like the one here construed by the Court of Appeals.

The Court of Appeals ruled on this question, citing the above decisions (record, p. 89) and did so in accord with such applicable decisions. It is petitioner who seeks to distinguish them, arguing that they are not in point because they did not involve employees rendering railroad service (petition, p. 10). But the Pullman Company is a sleeping car company. It is not a Railroad Company or a common carrier by railroad. It furnishes accomodations for greater travel comfort; it does not perform haulage functions. The work which Pullman porters perform in parlor and sleeping cars has nothing to do with the running of the train. Their duties are to attend to the inside of the car to which they respectively are assigned and to service passengers in such car.

These distinctions are so familiar and have been so clearly pointed out in *Wells Fargo & Co.* v. *Taylor, Chicago Refrigerator Co.* v. *I. C. C.* and *Adams* v. *New Jersey Steamboat Co.*, that we will not elaborate them here.

The inclusion of "sleeping car companies" in the definition of the term "common carrier" *"as used in this chapter"* in the Interstate Commerce Act, to which petitioner refers on page 17, is not in point. That Act similarly defines pipe line companies, telegraph companies, and express companies as common carriers. The term defined is simply "common carrier" and not "common carrier by railroad," as used in the Employers' Liability Act, which is an entirely different matter; but even if the latter term had been used, it would still not be in point, because it was needed for Interstate Commerce Commission to make directives as to rate making and the like.

> 49 U. S. Code Annotated, p. 48, notes to Sec. 1, par. 3, Definitions.

As we have already attempted to show, petitioner's contention under the State Compensation Act was decided on the pleadings, the contract and the record and resulted in a decision that petitioner's cause of action had been assigned to the Pullman Company, and that this is not the character of decision which this Court would be inclined to review even on writ of error (*ante*, p. 8).

As we have also attempted to show, petitioner, having invoked the Workmen's Compensation Law in the State Courts, seeking to obtain a decision, under State law, that his cause of action against respondent, despite his failure to bring the action within the statutory periods, subsists under the Workmen's Compensation Law, by reason of the contract between the Pullman Company and respondent, and the Courts, after considering the arguments of both parties, having decided, as a matter of State law, that petitioner's cause of action against respondent had become the property of the Pullman Company, there can be no basis for a claim that *he* can now maintain that cause of action against respondent at common law or under any other statute, or upon any theory (*ante*, p. 5).

Finally, petitioner can hardly be permitted to walk on both sides of the road, by having persisted in his claim under the State Compensation Act, and, simultaneously, having sought to be relieved of his own deliberate or negligent failure under that Act by claiming that the Workmen's Compensation Act does not apply. "Where the judgment of the state court rests on two grounds, one involving a federal question and the other not, or if it does not appear upon which of two grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction."

Lynch v. *New York*, 293 U. S. 52, 54-5.

II. Petitioner, in his petition, sets forth four reasons for granting the writ (p. 9):

"1," in substance, is that this case presents a question of federal law not heretofore passed on by this Court. We urge that the cases which we cited and to which he refers in "1" dispose of this claim.

"2," in substance, is that there is a necessity of uniformity and, therefore, of exclusive national regulation and control of "railways and their labor relations."

This, we suggest, has nothing to do with the Pullman Company or the work of Pullman porters in serving passengers in "parlor cars" and "sleeping cars." The Pullman Company has nothing to do with the operation of trains.

"3," in substance, is that this case is of "great importance to petitioner" and to persons employed on Pullman cars, because, under the Federal Employers' Liability Act, he is entitled to "*full compensation*" (italics his) instead of the amounts allowed by the Workmen's Compensation Act.

But under the Federal Employers' Liability Act, an employee is not entitled to "compensation" at all!

He is merely given the right to maintain an action in the Courts for damages, under somewhat more favorable rules than at common law.

As to compensation for injured workmen. Some forty years ago, there arose in New York State a public demand for a compensation law for workmen, to ensure them compensation without their being compelled to have recourse only to the uncertainties, inequalities and expense of actions for damages, frequently coupled with contingent fees and what not. In addition, experience had shown that there was danger of injured employees and their dependents becoming objects of charity. Pursuant to this widespread demand, the State, in 1910, enacted a compensation law (Laws of 1910, Chap. 674), but it was held to be uncon-

stitutional (*Ives* v. *South Buffalo Railroad,* 201 N. Y. 271). The demand persisted and the Legislature twice approved a Constitutional amendment, as required for such an amendment, and the people approved it (Constitution, Article I, Sec. 18). Then came the new Act, adopted by Laws of 1914, Chapter 41. As we are credibly informed, every State in the Union, except Mississippi, has a compensation law. The New York Workmen's Compensation Act has long been recognized as a humane act and, during the intervening thirty years, it is a matter of common knowledge that it has worked well.

Petitioner's contention, in his reason "3," if it were sound, would deprive other porters of their right to compensation, and if they complied with the Act, as petitioner did not, to their right to bring a third party action under the Act. The loss of right to compensation in New York State would be tragic. "The Act does not purport to provide compensation *for a wrong*" (*Post* v. *Burger,* 216 N. Y. 544, 550). Deprived of his right to "compensation," an injured porter would be worse off rather than better.

As against the Pullman Co., since railroad accidents seldom involve negligence on its part (derailments from all causes, grade crossings and the like), the remedy by action would usually be valueless.

As against a Railroad, the remedy, in practical application, would differ only slightly from the third party action now provided by the Workmen's Compensation Law.

Thus, if there were any basis for petitioner's reasoning, a New York porter would merely exchange his third party action for the right of action provided by the Federal Employers' Liability Act, gaining nothing, *but losing the important benefits of compensation from his employer, even though his employer had done him no wrong.*

"4" Petitioner concludes his "reasons" (p. 10) by an appeal on behalf of a class—the persons employed on

Pullman cars. But this appeal of his, however well intended, does not include any such class. A Pullman porter who takes the benefits of compensation under the Act also avails himself of the Act, where he has a meritorious cause of action against a third party, by bringing a timely action under the Act. This appeal, therefore, relates to petitioner's individual case, where, although he availed himself of the Act by taking compensation, he deliberately or negligently failed to take advantage of the Act by bringing a third party action as provided in the Act. Such a case, quite obviously, is not of wide importance. It is an isolated case.

FOURTH

The petition should be denied.

New York, December 26, 1945.

Respectfully submitted,

JOHN GODFREY SAXE,
Counsel for Respondent.

CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM—1945

No. 608

JAMES A. TAYLOR,

Petitioner,

against

NEW YORK CENTRAL RAILROAD COMPANY,

Respondent.

PETITIONER'S REPLY MEMORANDUM

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This case could not have been, and was not, decided by the State Courts, against the petitioner, without determining the basic federal question of whether the petitioner was protected by the Federal Employers' Liability Act. The Trial Court passed upon that question (R., p. 39). The Court of Appeals did so, and devoted to that question more than half of its over five-page opinion (294 N. Y. 397, 402-405).

Not only did the State Courts pass upon that federal question; it is obvious that they recognized the question had to be passed on and was basic to the case. In the face of the record and the opinions, a certification by the Court of Appeals that the question was presented and necessarily passed upon would be wholly superfluous; its absence is immaterial (*Williams* v. *Kaiser*, 323 U. S. 471, 477-478; *cf. Honeyman* v. *Hanan*, 300 U. S. 14).

It is immaterial how the case reached the New York Court of Appeals. Concurrently with its dismissal of the appeal taken as of right, that Court granted leave to appeal and thus took jurisdiction. Its acceptance of jurisdiction by that route rather than by appeal as of right, if viewed as a holding, in that preliminary review of the case, that the Court perceived no substantial question of constitutional construction, is of no significance, because: (a) the constitutional principle that where the Federal Employers' Liability Act applies the State Workmen's Compensation Law is excluded being well-settled and recognized by the State decisions, it is fair to conclude that the Court viewed the question of whether the Federal Act applied not an issue over "the construction of the constitution" (N. Y. Civil Practice Act, Sec. 588, Subd. 1) but solely one over the construction of the federal statute and as such not appealable without its leave where there was a unanimous affirmance by the intermediate appellate court; (b) what we are concerned with here is not the constitutional but *federal* nature of the issue; (c) the substantial nature of that and the Court of Appeals' recognition thereof are attested by the opinion which that Court rendered after the complete hearing of the appeal on the merits.

It is true that in the State Courts the petitioner contended also that even if, as a matter of paramount federal law, he was not protected by the Federal Employers' Liability Act, nevertheless, under a proper construction of the State Workmen's Compensation Law and its application to the facts of the case, he was not deprived of his cause of action against the Central. The presentation of that argument on the state law did not eliminate or prejudice the petitioner's contention that, as a matter of binding federal law, the state statute had no application whatsoever. On the contrary, the authoritative and final rejection by the State Courts of petitioner's plea for the liberal construction of the state statute, rendered *the federal question the controlling one.*

The State Courts did not decide that, by general law, irrespective of the applicability of the Federal Employers' Liability Act, petitioner was deprived of his cause of action. Their decision is that the Federal Employers' Liability Act did not apply and, hence, the State Workmen's Compensation Law gave Central a complete defense. That ruling on the federal question is the premise and basis of the decision.

Contrary to the impression that one may gain from a reading of the respondent's brief, petitioner did not base or rest his case on the State Workmen's Compensation Law. He brought an ordinary personal injury action. It was the defendant who invoked the State Workmen's Compensation Law as a defense (see pleadings, R., pp. 4-13; Petitioner's Brief, pp. 22-23). It was on that defense—and solely on that defense—that the respondent prevailed in the State Courts. If, as we contend, as a matter of paramount federal law, the Federal Employers' Liability Act applies to the exclusion of the State Workmen's Compensation Law, it is incontrovertible that the judgment in favor of the defendant is contrary to the federal law and federal constitution.

On all other points, the petitioner respectfully rests, without further comment, on the petition and brief heretofore filed.

Dated: New York, December 28, 1945.

Respectfully submitted,

COPAL MINTZ,
Attorney for Petitioner.